No. [illegible]

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HENRY A. JENSEN, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

GEORGE NEUNER,
United States Attorney.
FRANCIS E. MARSH,
Assistant United States Attorney.
WILLIAM WOLFF SMITH,
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STATEMENT OF THE CASE

Henry A. Jensen, plaintiff below and hereinafter called plaintiff, was granted $10,000 war risk term insurance while in the military service of the defendant. This insurance lapsed for nonpayment of the premium for the month of June, 1919. On June 2, 1927, the plaintiff applied to the United States Veterans' Bureau for reinstatement and conversion of this lapsed insurance in the full amount. The application was accepted, and effective July 1, 1927, there issued to the plaintiff a five-year convertible term policy in the amount of $10,000. Premiums on this policy were paid by the plaintiff until for the month of January, 1928. The plaintiff became permanently and totally disabled at least as early as December 7, 1927. None of the

foregoing facts are in dispute. The United States Veterans' Bureau by action taken on December 8, 1927, rated the plaintiff permanently and totally disabled as of December 7, 1927, and on May 5, 1928, the Director of the United States Veterans' Bureau determined that permanent and total disability existed from and after the 19th day of August, 1926, which was a date prior to the application for and issuance of the convertible term policy. (Par. IV, further and separate answer, R. 18, 19.) On June 14, 1928, the plaintiff was advised that his policy had been cancelled, and all premiums paid by plaintiff were returned to him. (Par. VI, further and separate answer, R. 19, 20.)

The plaintiff filed a demurrer to the further and separate answer of the defendant on the ground that same did not constitute a defense to the complaint. (R. 22.) The demurrer was sustained by order entered April 17, 1929. (R. 23.) A jury was waived in writing. (R. 27.) At the trial the defendant stipulated that plaintiff was permanently and totally disabled on December 7, 1927, and thereupon the plaintiff rested. (Bill of Exceptions, R. 39.)

The defendant then offered to prove that on December 8, 1927, the Veterans' Bureau rated the plaintiff permanently and totally disabled as of December 7, 1927; that on the 5th day of May, 1928, it was finally determined by the Director of the United States Veterans' Bureau that plaintiff

was permanently and totally disabled from the 19th day of August, 1926; that on June 14, 1928, plaintiff was advised that the action of the Veterans' Bureau in reinstating and converting said insurance was erroneous, contrary to law, and void; that the policy of converted insurance was cancelled; that the premiums tendered by plaintiff were returned to the plaintiff. (Bill of Exceptions, R. 40, 41, 42.)

To this offer of proof the plaintiff objected. (R. 42.) The objection was sustained (R. 43), and an exception taken by the defendant and noted by the Court (R. 43). Judgment for the plaintiff awarding installments of $52.91 per month from December 7, 1927, was filed June 17, 1929. From this judgment the defendant is here on appeal.

ASSIGNMENTS OF ERROR

I

That the Court erred in sustaining the demurrer of the plaintiff to the further and separate answer and defense contained in defendant's answer to plaintiff's complaint.

II

That the Court erred in denying the admission of proof to substantiate the allegations contained in defendant's further and separate answer as appear in Exception Number I.

That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. (Section 402 of the Act of October 6, 1917, 40 Stat. 409.)

Not later than five years after the date of the termination of the war, as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. (Section 404 of the Act of October 6, 1917, 40 Stat. 410.)

This insurance is subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract. (Regulation, Bulletin No. 1, promulgated October 15, 1917.)

In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with an application for reinstatement, in whole or in part, of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this

amendatory Act or within two years after the date of lapse or cancellation: *Provided,* That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further,* That the applicant during his lifetime submits proof satisfactory to the director showing that he is not totally and permanently disabled. (Section 304 of the World War Veterans' Act 1924, as amended, 44 Stat. 799.)

Subject to the provisions of section 29 of the War Risk Insurance Act and amendments thereto policies of insurance heretofore or hereafter issued in accordance with Article IV of the War Risk Insurance Act shall be incontestable after six months from date of issuance, or reinstatement, except for fraud or nonpayment of premiums. (Section 411 of the War Risk Insurance Act as amended by the Act of August 9, 1921, 42 Stat. 157.)

All such policies of insurance heretofore or hereafter issued shall be incontestable after the insurance has been in force six months from the date of issuance or reinstatement, except for fraud or nonpayment of premiums and subject to the provisions of section 23: *Provided,* That a letter mailed by the bureau to the insured at his last known address informing him of the invalidity of his insurance shall be deemed a contest within the meaning of this section: *Provided further,* That this section shall be

deemed to be in effect as of April 6, 1917. (Section 411 of the War Risk Insurance Act as amended March 4, 1923, 42 Stat. 1527; now Section 307 of the World War Veterans' Act 1924, 43 Stat. 627.)

ARGUMENT

The questions in this case are:

> Did the happening of the contingency insured against within six months from date of issuance of the reinstated policy, and so found by the Veterans' Bureau within such six months, operate to suspend the incontestable clause provided in Section 307?

And if it did—

> Did the finding of the Director on May 5, 1928 (more than six months subsequent to the reinstatement of the policy), that the plaintiff was permanently and totally disabled from August 19, 1926 (prior to the reinstatement of the policy), together with the fact that on June 14, 1928, plaintiff was advised of the cancellation of his policy and his premiums returned, as was alleged in the further and separate answer of the defendant, constitute a defense?

The answers to these questions turn on the interpretation of the language "has been in force," as found in Section 307, quoted herein at page 4, and the sufficiency of the allegations of the defendant's further and separate answer. (R. 17–20.)

A restatement of the material admitted facts is:

July 1, 1927. Issuance of the reinstated policy.

December 7, 1927. Existence of permanent and total disability as determined by defendant and admitted by plaintiff.

May 5, 1928. A finding of permanent and total disability by the Director of the United States Veterans' Bureau effective as of August 19, 1926.

June 14, 1928. Plaintiff notified of cancellation of policy and premiums returned to plaintiff.

Section 411 of the War Risk Insurance Act, which was enacted on August 9, 1921 (42 Stat. 157), provided that the policy, with certain exceptions, became incontestable after six months *from date of issuance or reinstatement.*

When the Bureau came to apply this Section it was found that it was held in a large number of cases that provisions similar to Section 411 as it appeared in the Act of August 9, 1921, did not protect the Bureau unless the policy was contested in court within the six months' period after the issuance of the policy even when the insured had died in the meantime. On the other hand, it was found that the United States Circuit Court of Appeals in the case of the *Mutual Reserve Fund Life Association* v. *Austin,* 142 Fed. 398, 6 L. R. A., N. S. 1064, had indicated that insertion of the words

"in continuous force" limited the application of the incontestable clause to the lifetime of the insured, and that the same views have also been indicated by the Supreme Court of Illinois in *Monahan* v. *Metropolitan Life Insurance Co.,* 283 Ill. 136, L. R. A. 1918 D. 1196.

Thereupon the Bureau requested that Section 411 be amended, and on March 4, 1923, said Section 411 was amended (42 Stat. 1527) and made retroactive to April 6, 1917, and therein it was provided that the policy became incontestable "after the insurance *has been in force* six months from the date of issuance or reinstatement." With the passage of the World War Veterans' Act, 1924, said Section 411 was reenacted as Section 307 (43 Stat. 627) with the same incontestable clause as appeared in Section 411 of the War Risk Insurance Act, as amended by the Act of March 4, 1923, supra.

It is a well recognized rule of statutory construction that where an amendment is enacted it must be presumed that the Legislature intended to make a change in the law as it stood previously and the amendment should be so construed as to give effect to this intention. (Black on Interpretation of Law, Section 165.)

To ascertain the intention of Congress resort may be had to the Reports of the Committee in charge of the legislation. (*Duplex Printing Co.* v. *Emil J. Deering,* 254 U. S. 443.)

The Report of the Committee on Interstate and Foreign Commerce on the Bill which afterwards became the Act of March 4, 1923, contains the following:

> Section 9 of the bill amends Section 411 of the present law so that a policy of insurance shall be incontestable after it has been in force six months, instead of providing that the policy shall be incontestable six months after date of issuance or reinstatement. Section 411 now provides that, subject to Section 29, a policy of insurance heretofore or hereafter issued in accordance with article 4 of the War Risk Insurance Act shall be incontestable after six months from date of issuance or date of reinstatement, except for fraud or nonpayment of premiums. The Bureau has found upon investigation that a large number of cases construing a similar proviso in insurance policies have held that the maturity of the policy did not stop the running of the statute, and that the statute could be stopped from running only by action brought in court to cancel the policy. In other words, if an insured paid one month's premium and no more and died or became permanently disabled within that month the Government would be bound to pay the policy (if the bureau followed these opinions) unless the Government, within six months from the date of issuance of the policy or reinstatement had begun a suit to cancel the policy. *The amendment, instead of provid-*

> *ing that the policy shall be incontestable six months after date, provides that it shall be incontestable after the policy "has been in force six months." All the cases hold that where the provision in the policy is that it must be in force six months that the maturity of the policy stops the running of the statute and the insurer can contest.* (Congressional Record, Vol. 64, Part 5, pages 5195, 5196.)

The intent of Congress expressed in the foregoing Committee Report is clear and certain and it must follow that the phrase "has been in force," as it applies to the policy of insurance issued under the War Risk Insurance Act, or its amendments, *means this and just this: that if death or permanent and total disability of the insured happens within six months from the date of issuance of the policy the incontestable clause is suspended.*

If the plaintiff should urge that similar language in ordinary insurance contracts has been interpreted otherwise by the Courts—as admittedly is the fact—that is something with which we are not and can not here be concerned for *in this case we are not dealing with an ordinary contract of insurance* but one commonly known as a war-risk insurance contract, one which by an unbroken line of decisions is held not controlled by state laws or decisions, and one issued subject to statutes and regulations then existent, or thereafter enacted or promulgated. (*Helmholz et al.* v. *Horst et al.,* 294

Fed. 417; *Sawyer* v. *United States,* 10 Fed. (2d) 416; *White* v. *United States,* 270 U. S. 175.)

Further, the United States Veterans' Bureau, the Department of the Government charged with the administration of war-risk insurance legislation, has from the beginning construed the language "has been in force" in conformity with the clearly expressed intent of Congress as is set out in the foregoing Committee Report.

In an opinion by the General Counsel of the United States Veterans' Bureau rendered June 3, 1924, in the case of Otis L. Sutherland, it was stated: "The precedents of this office have consistently held that the insured must survive the six months' period prescribed by the statute in order for the incontestable clause to operate." (28 Opinions General Counsel 1440.)

> A settled construction by a Department of the Government of the laws of the United States will not be overturned by the courts unless clearly wrong. (*Illinois Surety Co.* v. *United States,* 249 U. S. 214; 60 L. Ed. 609.)

When Congress reenacted Section 307 of the World War Veterans' Act, using the identical language of Section 411 of the War Risk Insurance Act, it knew, or was presumed to know, the construction which had been placed thereon by the Veterans' Bureau; and in reenacting the law without change Congress impliedly recognized and ap-

proved the Veterans' Bureau's construction of the phrase "has been in force" under the rule laid down in the case of United States *v.* Cerecedo Hermanos Y Compania, 209 U. S. 337; 52 L. Ed. 821, which holds that:

> The reenactment by Congress, without change, of a statute which has previously received a long-continued executive construction, is an adoption by Congress of such construction.

Recalling then that as is provided in Section 304 of the World War Veterans' Act, which is quoted in this brief at page 4, it is the Director of the Veterans' Bureau who determines whether or not insurance shall be reinstated; that the defendant in its further and separate answer alleged and then offered to prove that the Director had determined this plaintiff to have become permanently and totally disabled prior to the issuance of this insurance; that the plaintiff admitted that he became permanently and totally disabled within six months from the date of the issuance of the policy and that the Bureau had so rated him; that thereafter the Bureau had notified the plaintiff of its action in cancelling the policy; that the defendant returned the premiums to the plaintiff; and that *this contract provided that the operation of the incontestable clause was suspended if the contingency insured against happened within six months from date of issuance,* it must follow that the Trial Court erred

in sustaining plaintiff's demurrer to the defendant's further and separate answer.

It is respectfully submitted that the judgment of the Trial Court should be reversed.

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